No. 76-5722

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

RONALD M. SCHLEIS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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OPINION BELOW

The opinion of the court of appeals (Pet. App.) is reported at 543 F. 2d 59.

JURISDICTION

The judgment of the court of appeals was entered on October 21, 1976. The petition for a writ of certiorari was filed on November 19, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the pat down search and subsequent arrest of petitioner were lawful.

2. Whether the warrantless, probable cause search of petitioner's locked briefcase at the police station, shortly after his arrest, violated the Fourth Amendment.

STATEMENT

After a non-jury trial on stipulated facts in the United States District Court for the District of Minnesota, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1). He was sentenced to fifteen years' imprisonment to be followed by a special parole term of ten

years. The court of appeals affirmed (Pet. App.).

On November 17, 1974, Leon Cheney, an off-duty Deputy United States Marshal, was leaving a restaurant in Burnsville, Minnesota, when he observed petitioner walking toward the restaurant. After weaving and stumbling at the restaurant foyer, petitioner made several attempts to place a call from a public telephone, but he fumbled with the coin in the slot and was unable to dial. As Cheney entered the foyer, petitioner was leaning against the telephone clutching a briefcase and his head was bobbing and weaving. Cheney approached petitioner and noticed that his eyes were dilated and staring, although Cheney detected no odor of alcohol on petitioner's breath. Moreover, petitioner's responses to Cheney's questions were virtually inaudible. Cheney therefore concluded that petitioner was under the influence of something other than liquor (T. 6-12).[1/]

Cheney asked petitioner to step outside with him. Before leaving the foyer, however, Cheney attempted to identify himself to petitioner as a deputy marshal and to read petitioner his Miranda rights. Cheney also had his wife call the local police department, because he believed that petitioner might require treatment under the local public welfare law. Once outside the restaurant, Cheney took precautions for his own personal safety by placing petitioner's hands on the hood of a car and patting him down for weapons. In the course of the frisk, Cheney removed a large bulky wallet from petitioner's hip pocket and threw it on the hood of the car.[2/] The wallet opened and revealed a large amount of currency and a small plastic bag that appeared to contain marihuana (T. 14-19, 36).

When a police officer arrived at the scene, Cheney showed him the evidence that he had discovered. The officer recalled that approximately a year earlier another police officer had pointed out

1/ "T." refers to the transcript of the suppression hearing.

2/ Cheney knew from his training that objects the size of petitioner's wallet had been used to conceal weapons (T. 17-18).

petitioner to him as a drug dealer. Petitioner was then arrested. Since a crowd was gathering, petitioner was taken to the police station before a search was conducted. At the station, a search of petitioner's clothing revealed a plastic medicine bottle containing cocaine. In addition, inside petitioner's briefcase the police found more than two pounds of cocaine in plastic bags (T. 21-22, 24, 40).

ARGUMENT

1. Petitioner contends (Pet. 6-10) that the pat-down search that led to the discovery of the marihuana was unlawful. The mistaken premise of petitioner's argument, however, is that Cheney frisked him because of his "mere intoxication" (Pet. 9) in public and without any reason to believe that petitioner represented a potential danger to Cheney's personal safety. On the contrary, the court of appeals concluded that Cheney's observations of petitioner's condition justified a brief investigatory stop and that, under the circumstances, it was reasonable for Cheney's "own protection to determine whether [petitioner] was carrying any dangerous weapons" (Pet. App. 4). See Terry v. Ohio, 392 U.S. 1.

The court of appeals' conclusions are amply supported by the record. Cheney recognized that petitioner was under the strong influence of a drug other than alcohol. As a federal law enforcement officer empowered to make warrantless arrests (see 18 U.S.C. 3503), Cheney properly detained petitioner momentarily for further investigation as to whether he was in unlawful possession of a controlled substance. See 21 U.S.C. 844. He then was permitted to take reasonable precautions against the possibility that petitioner was carrying a concealed weapon and that, because of petitioner's evident involvement with drugs and his unstable condition, petitioner might be a threat to his safety. Adams v. Williams, 407 U.S. 143, 146. As the court of appeals noted (Pet. App. 4), the manner of the search was not unduly intrusive; Cheney patted down petitioner's outer clothing and removed only the bulky object in petitioner's pocket -- an

object that Cheney recognized from his training as capable of concealing a weapon. When the object, a wallet, fell open and revealed marihuana, probable cause existed for petitioner's arrest, and the arrival of a police officer who recognized petitioner as a drug dealer strengthened this justification.

2. Petitioner contends (Pet. 10-11) that the opening of his locked briefcase by the police without a warrant was unconstitutional. The court of appeals held (Pet. App. 5-6), correctly in our view, that in light of petitioner's antecedent arrest for possession of drugs, the officers' indisputable right to seize the briefcase, and the existence of probable cause to believe that the briefcase contained contraband, any justifiable expectation of privacy that petitioner held with regard to the contents of the briefcase had disappeared and the warrantless search was reasonable under the Fourth Amendment. See United States v. Edwards, 415 U.S. 800, 802-804; Draper v. United States, 358 U.S. 307, 314.[3/]

Although we therefore believe that the court below properly rejected petitioner's claims, we recognize that the issue presented in this case is similar to that in United States v. Chadwick, No. 75-1721, certiorari granted, October 4, 1976. Chadwick involves the question whether a search warrant is required before agents may open a locked footlocker that is properly in their possession following an arrest and that they have probable cause to believe contains contraband. Because they are frequently within the "immediate control" of a person at the time of his arrest, small hand-carried objects such as a briefcase are arguably distinguishable from footlockers, and the lower courts have repeatedly upheld the warrantless search of such objects as incident to lawful arrest. See, e.g., United

3/ Although petitioner appears to argue (Pet. 10) that there was no probable cause for the seizure or search of the briefcase, the discovery of the marihuana, petitioner's history as a drug dealer, and the removal of a bottle containing cocaine from his clothing unquestionably gave the police reason to believe that the briefcase contained narcotics. The lower court's determination of this issue does not, in any event, warrant further review.

States v. Giles, 536 F. 2d 136 (C.A. 6); United States v. Edmonds, 535 F. 2d 714 (C.A. 2); United States v. Patterton, 519 F. 2d 603 (C.A. 1), certiorari denied, 423 U.S. 987; United States v. Mehciz, 437 F. 2d 145 (C.A. 9), certiorari denied, 402 U.S. 974. While that rationale is also applicable here, the Court may nevertheless deem it appropriate to defer disposition of this petition pending the decision in Chadwick.

Respectfully submitted.

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JANUARY 1977.